IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES ("AFSCME") MICHIGAN COUNCIL 25 AND ITS AFFILIATED AFSCME LOCALS 23 AND 2394,

Plaintiffs-Appellants,

-and-

DETROIT CITY COUNCIL, et al.,

Intervening Plaintiffs-Appellants,

v

CITY OF DETROIT AND DETROIT HOUSING COMMISSION,

Defendants-Appellees.

Docket No. 122053

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE NO.

INDEX OF AUTHORITIES ii

I. THE JURISDICTIONAL ISSUE IS NOT MOOT 1

II. THE CITY AND DHC CONCEDE THAT A HOUSING COMMISSION'S ENUMERATED POWERS DO NOT INCLUDE PLENARY EMPLOYMENT AUTHORITY 2

III. THE CITY/DHC'S AUTONOMOUS EMPLOYER ARGUMENT IS CONTRARY TO THE ACT'S EXPRESS LANGUAGE AND BASIC STATUTORY CONSTRUCTION PRINCIPLES 4

IV. THE CITY AND DHC'S QUASI-CORPORATION AND PUBLIC BODY CORPORATE CASES DO NOT SUPPORT ITS ARGUMENT THAT DHC HAS IMPLIED PLENARY AUTONOMOUS EMPLOYMENT AUTHORITY 6

V. THE CITY/DHC CONCEDE THAT THEY CONTINUED TO OPERATED AS JOINT EMPLOYERS AFTER 1996 - - WHICH WOULD HAVE BEEN LEGALLY IMPOSSIBLE HAD DHC BECOME A COMPLETELY AUTONOMOUS EMPLOYER "BY OPERATION OF LAW" IN 1996 7

VI. THE CITY AND DHC DO NOT DENY THAT THE CITY CHARTER GOVERNS THE MAYOR AND CITY COUNCIL'S CONDUCT 8

VII. THE TRIAL COURT'S FINDING THAT THE CITY AND DHC ARE CO-EMPLOYERS IS CORRECT 10

CONCLUSION AND RELIEF REQUESTED 12

INDEX OF AUTHORITIES

PAGES

CASES

Advisory Opinion re Constitutionality of PA 1996, No. 346, 380 Mich 554 (1968) 6

Amway v Grand Rapids R Company, 211 Mich 598 (1920) 1

Federated Publications, Inc. v City of Lansing, 467 Mich 98 (2002) 1

Gebhardt v. O'Rourke, 444 Mich 535 (1994) 5

Huron-Clinton Metropolitan Authority v Attorney General, 146 Mich App 82 (1985) 6

MCI Telecommunications Complaint, 460 Mich 396 (1999) 5

Midland Publishing, 420 Mich 148 (1984) 1

St. Clair County Sheriff v Local 1518, Council 11, AFSCME, 1976 MERC Lab Op 708 . . 11, 12

St. Clair Prosecutor v AFSCME Local 1518, 425 Mich 204 (1986) 11

STATUTES

Housing Facilities Act, MCL 125.651 et seq. 2

Housing Act, §4 2

Housing Act, §5 . . . . . 5, 7, 8, 9, 12

Housing Act, §7 3

Housing Act, §7(g) 4-6

MCL 125.654(5)(a)-(e) 3

MCL 125.655(3) 4

MCL 125.655(c) 10

MCL 125.657 4

Public Employment Relations Act, MCL 423.201 et seq. ("PERA") 1

MCL 423.201, §16(h) 1

COURT RULES

MCR 7.202(7)(a)(i) 2

MCR 7.203(A)(1) 2

I. THE JURISDICTIONAL ISSUE IS NOT MOOT

As Defendants/Appellees City of Detroit ("the City") and the Detroit Housing Commission ("DHC") concede, an issue is not rejected as moot where it is likely to reoccur. *Federated Publications, Inc. v City of Lansing*, 467 Mich 98, 112 (2002), citing *Amway v Grand Rapids R Company*, 211 Mich 598, 612 (1920) and *In re Midland Publishing*, 420 Mich 148, 152 (1984). Where, as here, the parties have a relationship that is governed by the Public Employment Relations Act, MCL 423.201 et seq. ("PERA"), which authorizes injunctive relief pending resolution of complaints issued by the Michigan Employment Relations Commission ("MERC"), this issue is necessarily likely to reoccur and should be resolved.

Equally significantly, the City and DHC do not deny that:

1. Count I of AFSCME's complaint presented "a request for injunction relief under Section 16(h) of PERA [which authorizes] individuals pursuing an unfair labor practice before MERC [to] obtain injunctive relief pending the outcome of MERC procedures." City/DHC Brief, 47, n 28;

2. No party filed a motion for summary disposition with respect to County I of AFSCME's complaint and Count I was still pending when the Court of Appeals assumed jurisdiction of this matter;

3. The Court of Appeals granted the City/DHC's application for leave and issued its decision in this matter on July 23, 2002; and

4. MERC did not decide the underlying unfair labor practice complaint until November 5, 2002.

In the circumstances, it is undisputed that the Court of Appeals assumed jurisdiction of this case while Count I of AFSCME's complaint was still pending in the trial court and, therefore, before a final order was entered within the meaning of MCR 7.203(A)(1) and MCR 7.202(7)(a)(i).

The Court of Appeals clearly erred in accepting jurisdiction of the City's and DHC's appeal where the trial court had not adjudicated Count I of AFSCME's complaint.

II. THE CITY AND DHC CONCEDE THAT A HOUSING COMMISSION'S ENUMERATED POWERS DO NOT INCLUDE PLENARY EMPLOYMENT AUTHORITY

Although the City and DHC argue that DHC is a "quasi-corporation" with employment authority, they concede that "the enumerated powers provision of the Housing Facilities Act, MCL 125.651 et seq. ("the Housing Act" or "the Act") does not expressly state the power to employ." Brief, 31. Nor do they deny that Section 4 of the Housing Act, which defines DHC's powers as a "public body corporate," makes no reference to employment whatsoever and instead provides:

> The Commission shall be a public body corporate. Except as otherwise provided in this Act, the Commission may do all of the following:
>
> (a) Sue and be sued in any court of the state.
>
> (b) Form or incorporate nonprofit corporations under the law of this state for any purpose not inconsistent with the purposes for which the commission was formed.
>
> (c) Serve as a shareholder or member of a qualified nonprofit corporation organized under the laws of this state.
>
> (d) Authorize, approve, execute and file with the Michigan department of commerce those documents that are appropriate to form and continue one or more nonprofit corporations.
>
> (e) Form or incorporate for profit corporations, partnerships, and companies under the laws of this state for any purpose not

inconsistent with the purposes for which the Commission was formed. MCL 125.654(5)(a)-(e).

Nor does the City or DHC deny that Section 7 of the Act, which enumerates housing commission powers, makes no mention of any employer functions:

> Such commission shall have the following enumerated powers and duties:
>
> (a) To determine in what areas of the city or village it is necessary to provide proper sanitary housing facilities for families of low income and for the elimination of housing conditions which are detrimental to the public peace, health, safety, morals, and/or welfare;
>
> (b) To purchase, lease, sell, exchange, transfer, assign and mortgage any property, real or personal, or any interest therein or acquire the same by gift, bequest or under the power of eminent domain; to own, hold, clear and improve property; to engage in or to contract for the design and construction, reconstruction, alteration, improvement, extension, and/or repair of any housing project or projects or parts thereof; to lease and/or operate any housing project or projects;
>
> (c) To control and supervise all parks and playgrounds forming a part of such housing development but may contract with existing departments of the city or village for operation or maintenance of either or both;
>
> (d) To establish and revise rents of any housing project or projects, but shall rent all property for such sums as will make them self-supporting, including all charges for maintenance and operation, for principal and interest on loans and bonds, and for taxes;
>
> (e) To rent only to such tenants as are unable to pay for more expensive housing accommodations;
>
> (f) To call upon other departments for assistance in the performance of its duties, but said departments shall be reimbursed for any added expense incurred therefor.

(g) Shall have such other powers relating to said housing facility's project as may be prescribed by ordinance or resolution of the governing body of the city or village or as may be necessary to carry out the purposes of the Act. MCL 125.657.

The City and DHC are plainly in error when they claim that plenary employment authority is necessarily a power of the DHC.

III. THE CITY/DHC'S AUTONOMOUS EMPLOYER ARGUMENT IS CONTRARY TO THE ACT'S EXPRESS LANGUAGE AND BASIC STATUTORY CONSTRUCTION PRINCIPLES

The City/DHC argue that because Section 7(g) of the Act permits housing authorities to engage in activities "as may be necessary to carry out the purposes of the Act," DHC necessarily and automatically became a completely autonomous employer "by operation of law" in 1996. However, this argument is contrary to the express language of the Act and basic principles of statutory construction.

As the City and DHC concede, Section 5 of the Act expressly reserves complete classification and compensation authority to another entity - - namely the city. As the City and DHC's Brief concedes, the Act provides that the "appointing authority" (which they concede is the mayor) and the "governing body" (which they concede is the city council) are authorized by Section 5 to set the compensation and establish the classifications for housing employees. MCL 125.655(3). As they also concede, Section 5 provides that the compensation and classification established by the city is then "**to be used**" by the authority with respect to all employees. *Id.* (Emphasis added.) This explicit statutory language defeats the City/DHC argument that the 1996 Act stripped the City and City Council of its employment authority over housing employees and made DHC wholly autonomous in 1996.

The City and DHC's argument is also contrary to the statutory construction rule that the plain meaning of a statute must be given effect and that no construction should render any part of a statute meaningless:

> It is a maxim of statutory construction that every word of a statute should be read in a such a way as to be given meaning, and a court should avoid a construction that would render any part of the statute surplusage or nugatory. *In re MCI Telecommunications Complaint*, 460 Mich 396, 414 (1999).

The City/DHC's "autonomous employer by operation of law" argument conflicts with this statutory construction rule because it would render Section 5's provisions concerning the compensation/classification authority completely meaningless. If DHC was an independent, separate and autonomous employer, DHC would necessarily have unfettered power to establish its employees' compensation and classifications. If DHC's view of the Act was accurate, then the Act would have to be interpreted to mean that no third party could possibly intrude into DHC's determination of appropriate compensation and classifications for "its" employees. But that interpretation would require that the Section 5's plain language be ignored and that its provision reserving compensation and classification authority be deemed surplusage. Both results would be contrary to basic principles of statutory construction and are, therefore, wrong.

The City/DHC argument runs afoul of another basic statutory construction rule - - that the more specific statutory language governs the more general. *Gebhardt v. O'Rourke*, 444 Mich 535, 542 (1994) ("where a statute contains a general provision and a specific provision, the specific provision controls"). In this case, while the Section 7(g), on which the City and DHC rely, recites the power to engage in activities that are necessary to the purposes of the Act, Section 7(g) is merely a general statement. In contrast, as the City/DHC concede, Section 5 speaks specifically to the issue

of employment. Thus, where the provision that governs employment expressly reserves both compensation and classification authority to the city, the specific section, namely Section 5, controls. Section 7(g)'s catch-all phrase cannot be interpreted to supersede or diminish the specific language of Section 5.

IV. THE CITY AND DHC'S QUASI-CORPORATION AND PUBLIC BODY CORPORATE CASES DO NOT SUPPORT THEIR ARGUMENT THAT DHC HAS IMPLIED PLENARY AUTONOMOUS EMPLOYMENT AUTHORITY

In Section II of its brief, the City and DHC cite several cases for the proposition that DHC has plenary and sole employment power as a matter of law because it is a public body corporate and a quasi-corporation. But those cases do not support the City and DHC's argument.

In *Advisory Opinion re Constitutionality of PA 1996,* No. 346, 380 Mich 554 (1968) this Court held that a quasi-corporation is an "artificial" entity that the legislature may create "to perform some public work." *Id.* at 568-569. Rather than holding that a quasi-corporation has limitless authority, the Court held that "We must, as has been stated, look behind the name to the thing named." *Id.* at 571. In *Huron-Clinton Metropolitan Authority v Board of Supervisors,* 300 Mich 1 (1942), the Court rejected the argument that because an entity was a public body corporate, it necessarily had "powers commonly exercised by corporations." *Id.* at 20. As the Court said, that "contention cannot be sustained." *Id.*

Nor do the cases cited in Section II A of the City and DHC's brief support their argument that DHC's plenary employment authority can be implied. While those cases did find some implied authority, none implied a power where the statute contained express language limiting the exercise of that very power. For example, while the court implied a power to lease from a power to sell in *Huron-Clinton Metropolitan Authority v Attorney General*, 146 Mich App 82 (1985), the underlying

statute there did not have a provision defining the power to lease, much less limiting it. In contrast Section 5 of the Housing Act expressly defines (and limits) employment attributes. The cases cited by the City and DHC are, therefore, completely inapposite.

V. THE CITY/DHC CONCEDE THAT THEY CONTINUED TO OPERATED AS JOINT EMPLOYERS AFTER 1996 - - WHICH WOULD HAVE BEEN LEGALLY IMPOSSIBLE HAD DHC BECOME A COMPLETELY AUTONOMOUS EMPLOYER "BY OPERATION OF LAW" IN 1996

The City/DHC's basic premise is that DHC became a completely independent and autonomous employer by virtue of the 1996 Amendments to the Housing Act. (DHC became "the sole employer of its employees"; all housing commissions automatically became "autonomous employers" in 1996; DHC then became "an independent employer." City/DHC Brief, 22, 25, 40.) For the reasons previously discussed, City/DHC's operation-of-law claim is wrong. Section 5 of the Act, which reserves classification and compensation authority to the City, combined with the City's post-1996 exercise of that authority, defeat the City and DHC's argument. However, even assuming arguendo that DHC became a completely "sole," "independent" and "autonomous" employer in 1996, that argument collapses in the face of the Mayor's and DHC's own conduct after 1996.

The City and DHC admit that DHC and the City functioned as joint employers after 1996. They admit that since "1996, Mayor Archer has submitted budgets including the DHC employees in City employment." Brief, 37. They do not deny that after 1996 the City's governing body, i.e., the Detroit City Council, established compensation and classifications for all housing employees. They do not deny that throughout that period of time DHC employees remained in the City pension plan and covered by the City's health plans.

The City and DHC's explanation for their undisputed exercise of joint employment authority after 1996 is that DHC "needed time and processes to develop its own systems." Brief, 37. However, needing time would be completely immaterial if DHC had turned into a completely "sole," "independent" and "autonomous" employer by operation of law in 1996. If that had, in fact, occurred, the City could not have lawfully exercised any employment authority over housing employees.

Of course, the City did not act unlawfully. Its post-1996 conduct was protected by Section 5 of the Act and DHC's and the City's joint employer status.

VI. THE CITY AND DHC DO NOT DENY THAT THE CITY CHARTER GOVERNS THE MAYOR AND CITY COUNCIL'S CONDUCT

Neither the City nor DHC deny that:

1. In 1995 the City and the United States Department of Housing and Urban Development ("HUD") entered into agreement which included a separation plan for what was then known as a City housing department;

2. Pursuant to City Charter procedures, the Mayor asked City Council to approve a proposed amended executive organization plan in 1996 and transfer public housing functions from the housing department to a housing commission, which would enjoy greater "functional" independence in information systems, finance, budget, purchasing and human resources. 236A-242A;

3. The Mayor's September 1996 proposal, which conceded that it would not change or alter the employment status of employees assigned to the new housing commission, was approved by the City Council in September 1996, after the Housing Act was amended. *Id.*; 251A;

4. Also after the Housing Act was amended, pursuant to the Act, the City's housing ordinance, the Mayor's executive organization plan and the City Charter, the City Council exercised its authority and established housing employee compensation and classifications. 216A-235A;

5. Detroit City Charter governs the separation of powers between the Mayor and City Council;

6. The City Charter requires that ordinances may only be amended with City Council action;

7. The City Charter requires that changes in the Mayor's executive plan be presented to City Council;

8. The City Council has not rescinded its post-1996 compensation and classification resolutions; and

9. The City Council has not approved amendments to the housing ordinance or the executive organization plan which would yield all compensation and classification authority to DHC.

As the trial court found, given (a) Section 5's express language which authorizes a governing body to exercise classification and compensation control over housing authorities and (b) the City and the City Council post-1996 exercise of that authority, the City's compensations and classification resolutions, ordinance and executive organization plan can only be rescinded in a manner consistent with the procedures set forth in the Detroit City Charter. As is undisputed, those procedures require City Council action. As is undisputed, that has not occurred here.

VII. THE TRIAL COURT'S FINDING THAT THE CITY AND DHC ARE CO-EMPLOYERS IS CORRECT

At the April 10, 2002 hearing, the trial court made its findings with respect to the City and DHC's co-employer status. As the trial court noted, before it was amended, the Housing Act already provided that housing authorities already had certain employment powers:

> A president and vice president shall be elected by the commission, The commission may appoint a director who may also serve as secretary, and other employees or officers as are necessary. The commission shall prescribe the duties of its officers and employees and, with the approval of the appointing authority, may fix their compensation. The commission may employ engineers, architects and consultants, when necessary. **Pre-Amendment**, MCL 125.655(3); cited by the court on April 10, 2002, 112A-113A.

As the trial court also noted, when the statute was amended effective June 29, 1996, it did not give plenary compensation or classification authority to the housing commission. Rather, it repeated much of the pre-amendment text:

> A president and vice president shall be elected by the commission, The commission may appoint a director who may also serve as secretary, and other employees or officers as are necessary. Upon the recommendation of the appointing authority, the governing body of the appointing authority may adopt a resolution either conditioning the establishment of any compensation of an officer or employee of the commission upon the approval of the governing body or establishing compensation ranges and classifications to be used by the commission in fixing the compensation of its officers and employees. The commission shall prescribe the duties of its officers and employees and, with the approval of the appointing authority, may fix their compensation. The commission may employ engineers, architects and consultants, when necessary. **Post-Amendment**, MCL 125.655(c).

There, as here, the City and DHC argued that the Act's "may employ" and "fix the compensation"language necessarily meant that DHC was a completely independent employer as of

1996. But as the trial court correctly observed, those phrases were already in the Act before the 1996 amendments and could not, therefore, support the City and DHC's claim.

As the trial court noted, the 1996 amendments kept this old text and added new language reserving to cities the authority to decide whether or not to exercise control over housing employee compensation and classifications. Where, as here, it was undisputed that the City had elected after 1996 to exercise that authority, the trial court correctly held that the City and DHC remained co-employers: "I find that the City and Commission are co-employers." 117A-118A.

Although the City invokes *St. Clair Prosecutor v AFSCME Local 1518*, 425 Mich 204 (1986), that case, in fact, supports the trial court's holding. As this Court noted in *St. Clair Prosecutor, supra,* MERC appropriately came to a similar joint-employer conclusion in an analogous case, *St. Clair County Sheriff v Local 1518, Council 11, AFSCME*, 1976 MERC Lab Op 708.[1] As this Court remarked with approval in *St. Clair Prosecutor*, 425 Mich at 232, in *St. Clair Sheriff*, MERC correctly found that even though the sheriff had the power to hire and fire his employees and complete control over their activities, he was a co-employer with the county where the county controlled the number and salary of sheriff department employees:

> The board of supervisors of each county in the state is hereby authorized and empowered to direct the payment to the sheriff, under sheriff and deputy sheriffs and to the county clerk, county treasurer and registrar of deeds and their deputies of the county out of the general fund in the treasury of such county, such salaries as set or may be deemed proper. Such salaries may be fixed and determined by said board of supervisors at its annual meeting held in October prior to the commencement of the terms of said officers, and the same shall be compensation in full for services performed by such sheriff, under sheriff and deputy sheriff and by such county clerk, county

[1] A copy of this MERC case, discussed with approval in *St. Clair Prosecutor, supra*, is attached as Exhibit A for the Court's convenience.

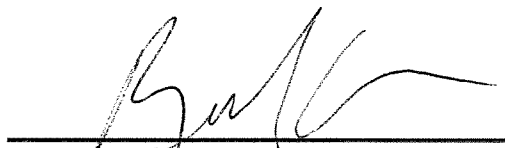
treasurer and registrar of deeds and their deputies. 1976 MERC Lab Op at 713.

Similarly here, where it is undisputed that all money flows through the City to DHC, where Section 5 authorizes the City to maintain control over compensation and classification, and, where the undisputed record shows that the City elected to maintain that control after 1996, the City has remained a co-employer with DHC.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons as well as those discussed in Appellants' Brief on Appeal, Plaintiffs-Appellants Michigan AFSCME Council 25, AFSCME Local 23 and AFSCME Local 2394 respectfully request that the Court reverse and vacate the July 23, 2002 decision of the Court of Appeals and award Appellants their costs and fees and such other relief as the Court deems appropriate.

MARTENS, ICE, GEARY, KLASS,
LEGGHIO, ISRAEL & GORCHOW, P.C.



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Dated: April 7, 2003

ST. CLAIR COUNTY SHERIFF,
Respondent-Public Employer,
-and-
LOCAL 1518, COUNCIL 11, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO,
Charging Party.

Case No. C76 A-24

97

B-I-b PERA
Commission Jurisdiction and Coverage of Act
Relationship to Other Statutes and Procedures

Sheriff's Act—Joint Employer with County Commissioners. Construing the sheriff's act, *MSA 5.863 et seq.*, Commission finds that the sheriff and the County Board of Commissioners are joint employers of employees of the sheriff's department. (No exceptions) (PERA)

B-III-b PERA
Representation Petition Issues
Question Concerning Representation

Employer Status—Joint Employer—Sheriff's Department. In an unfair labor practice proceeding, ALJ construes the sheriff's act and other statutes and finds that both the sheriff and the County Board of Commissioners are joint employers of employees of the sheriff's department. (No exceptions) (PERA)

B-VII-g PERA
Employer Unfair Labor Practices
Refusal to Bargain Found

(1) Employer Status—Joint Employer—Sheriff's Department. Based upon sheriff's act and other Michigan statutes, ALJ finds that both County Board of Commissioner and sheriff are joint employers of sheriff's department employees and sheriff may not refuse to bargain with the certified bargaining agent of the sheriff's department employees. (No exceptions) (PERA)

(2) Employer Status—Joint Employer—Only One Employer Named in Certification. In a decision finding that the sheriff and the County Board of Commissioners are joint employers of employees in the sheriff's department, ALJ holds that it makes no difference that the certification of bargaining agent named only the commissioners as employer, since, in fact, both are joint employers and the sheriff had full knowledge of the certification. The sheriff cannot refuse to sign contract negotiated by Board of Commissioners after negotiations in which an undersheriff participated with the sheriff's knowledge. (No exceptions) (PERA)

[*Headnote continued on next page*]

B-VII-g *(Continued)*

(3) Defenses—Joint Employer—Only One Employer Named in Certification. In a decision finding that the sheriff and the county Board of Commissioners are joint employers of employees in the sheriff's department, ALJ finds no defense in the fact that the certification of bargaining agent named only the commissioners as employer, since, in fact, both are joint employers and the sheriff had full knowledge of the certification. The sheriff cannot refuse to sign contract negotiated by Board of Commissioners after negotiations in which an undersheriff participated with the sheriff's knowledge. (No exceptions) (PERA)

(4) Refusal to Execute Contract. After finding that a sheriff and the County Board of Commissioners are joint employers of sheriff department employees, ALJ holds that sheriff cannot refuse to sign a contract executed after negotiations conducted primarily by representatives of the Board of Commissioners in which an undersheriff also participated with knowledge of the sheriff. (No exceptions) (PERA)

(5) Repudiation of Collective Bargaining Agreement. Sheriff is ordered to sign a contract as a joint employer, after negotiations conducted by a representative of the County Board of Commissioners, in which an undersheriff participated. ALJ holds that by participating in the bargaining (by attendance of the undersheriff) and then repudiating the agreement upon its completion, without ever contending that he was not bound by these negotiations, the sheriff has engaged in bad faith bargaining. (No exceptions) (PERA)

For the Respondent-Employer: Clyne, Clyne & Mosier, by Howard J. Clyne, Esq.

For the Charging Party: Zwerdling & Maurer, by George M. Maurer, Jr., Esq.

DECISION AND ORDER

On August 23, 1976, Administrative Law Judge Joseph B. Bixler issued his Decision and Recommended Order in the above-entitled matter finding that the Respondent St. Clair County Sheriff has engaged in and was engaging in certain unfair labor practices, and recommended that it cease and desist therefrom and take certain affirmative action as set forth in the Decision and Recommended Order of the Administrative Law Judge attached hereto.

The Decision and Recommended Order of the Administrative Law Judge was issued and served upon the interested parties in accordance with Section 16 of Act 336 of the Public Acts of 1947, as amended. The parties have had an opportunity

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RENATE KLASS

Subscribed and sworn to before me on
April 7, 2003

Lois J. Panepucci, Notary Public
Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission expires: 09/01/07